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CITATIONS

720-476—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 328

UNITED STATES OF AMERICA, APPELLANT

v.

ROCCO TATEO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court dismissing the indictments (R. 128–133) is reported at 216 F. Supp. 850. An earlier district court opinion setting aside the judgment of conviction (R. 46–57) is reported at 214 F. Supp. 560.

JURISDICTION

On May 8, 1963, the district court dismissed the indictments on the ground that the prosecution was barred by the Fifth Amendment's provision as to double jeopardy (R. 134–135). A notice of appeal to this Court was filed on June 6, 1963 (R. 135–137), and probable jurisdiction was noted on October 21,

1963 (R. 138). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTION PRESENTED

Appellee was brought to trial in 1956 under a five-count indictment. During trial, but before the case went to the jury, he withdrew his plea of not guilty and entered a plea of guilty to four of the five counts. Subsequently, in collateral proceedings the judgment of conviction was set aside on the ground that the trial judge had coerced the guilty plea. The question presented is whether the Fifth Amendment bars appellee's retrial under the four counts of the indictment to which he had previously pleaded guilty and upon which he had been sentenced.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment provides as follows:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

STATEMENT

On May 15, 1956, Tateo and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); taking and carrying away bank money (18 U.S.C. 2113(b)); receiving and possessing stolen bank money (18 U.S.C. 2113(c)); and conspiracy (18 U.S.C. 371). After four days of trial, on Friday, May 18, 1956, the

trial judge told counsel, during a conference in the robing room, that if the defendants were found guilty, he would impose a life sentence on the kidnapping count and consecutive sentences on the other counts (R. 48). As a result of the judge's statement, appellee's counsel urged him to plead guilty, pointing out that the government's case was strong and that there was a substantial likelihood of conviction. On the following Monday, Tateo entered his plea, which was accepted by the trial judge after inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure (R. 6–9). The next day, the co-defendant also changed his plea and at that time the jury was dismissed. Tateo was sentenced to imprisonment for a total of 22 years and 6 months. At the time of imposition of sentence, the prosecution consented to the dismissal of the kidnapping count on Tateo's motion.

On February 8, 1963, Judge Weinfeld granted appellee's motion under 28 U.S.C. 2255 to set aside the judgment of conviction and for a new trial, on the ground that (R. 55):

> With the normal strain under which a defendant labors during a trial, greatly intensified by the cumulative impact of the testimony offered against petitioner by his co-defendant, who had become a Government witness, the Court's advance announcement of the prospective sentence, and, based thereon, the strong urging of his own counsel to plead guilty, it is difficult to believe that the defendant had that capacity for reasoned choice, that freedom of will which is essential to a voluntary plea of guilty.

Tateo was reindicted for the kidnapping offense and brought before Judge Tyler for retrial of this charge and of the four bank robbery charges to which he had previously pleaded guilty. Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the new kidnapping indictment and the four bank robbery counts of the original indictment. As to the latter counts, Judge Tyler held that the action of the trial judge in coercing the guilty plea resulted in an improper dismissal of the jury before verdict and that therefore, under *Downum* v. *United States*, 372 U.S. 734, retrial was barred by the double-jeopardy prohibition of the Fifth Amendment. This appeal is from that decision. No appeal has been taken from the order dismissing the kidnapping indictment.

SUMMARY OF ARGUMENT

1. First announced explicitly in *United States* v. *Ball*, 163 U.S. 662, the rule that a defendant may be retried after he has taken steps to set aside his conviction has been basic to our law for almost seventy years. The rationale of the rule, as generally stated, is that the defendant waives his right not to be retried for a particular offense when he initiates the measures which look to reversal of the conviction. A minority of the Court has at times described the rule in terms of continuation of the original jeopardy until the cause is finally determined after all appeals, collateral attacks, and retrials. Under either statement, appellee is subject to retrial.

Moreover, the fundamental considerations of policy which support the *Ball* rule apply with full force to this case in which the defendant pleaded guilty during trial and subsequently proceeded under 28 U.S.C. 2255 to set the plea aside. First, forbidding retrial after a judgment of conviction has been set aside would grant defendants an immunity simply because of trial error, in derogation of the important interests which are at stake in a trial for crime. The history of the "double jeopardy" clause makes plain that this was never intended. The second and equally important justification for the *Ball* rule is that it allows reviewing courts to pass upon the fairness of a conviction uninfluenced by the issue of the defendant's guilt or innocence—a consideration which would invariably intrude upon the court's decision if reversal barred a subsequent retrial. The first of these reasons plainly applies to a judicial error which invalidates a plea just as much as to one infecting a jury verdict; the second applies with unusual force to review of the propriety of a guilty plea where coercion is rarely obvious and guilt often is.

This Court's decision in *Downum* v. *United States*, 372 U.S. 734, does not cast doubt upon the *Ball* rule or its applicability to this case. Thus, one of the principal justifications for the *Ball* rule—to permit judicial consideration of the impact of trial error without reference to the guilt or innocence of the defendant—has no application in a mistrial case, such as *Downum*,

where the mistrial has been ordered for the convenience of the prosecutor or trial court and not to protect the defendant from the effects of the trial error. Where, in contrast, a mistrial has been ordered to protect the defendant, this Court has allowed retrial—even in contexts where the traditional doctrine of "waiver" cannot be applied—for reasons analogous to those supporting the *Ball* rule, *i.e.*, to secure the trial court's freedom of action in assuring a fair trial. *Gori* v. *United States*, 367 U.S. 364.

2. Even if the present case were treated as if Tateo had moved for a mistrial, instead of pleading guilty, retrial would be authorized. To bar retrial here would be to grant immunity as a consequence of an action of the defendant which, although invalid as a guilty plea, was no less voluntary than the ordinary defense motion for a mistrial and which, upon the setting aside of the conviction, has proved to be much to the defendant's advantage (having resulted in the termination of a trial which his counsel regarded as very likely to result in conviction). Thus, although we submit that this case is properly subject to the *Ball* rule and should not be analogized to a mistrial, there is no bar to a retrial whether the Court views the case as the ordinary one of the *Ball* type, in which a post-conviction remedy has been invoked by the defendant, or treats it as analogous to the mistrial cases because the defendant was induced to forego obtaining the verdict of the original jury.

ARGUMENT

I

THE HOLDING OF *United States* v. *Ball*, 163 U.S. 662, AUTHORIZES RETRIAL OF A DEFENDANT WHOSE JUDGMENT OF CONVICTION, ENTERED ON A GUILTY PLEA MADE DURING TRIAL, HAS BEEN SET ASIDE ON COLLATERAL ATTACK

Appellant was under a judgment of conviction which had disposed of the four charges against him when he moved under 28 U.S.C. 2255 to set aside the sentence imposed on the plea of guilty he made during trial. Finding that the plea was coerced, Judge Weinfeld set aside the conviction and ordered a new trial. The court below has now held (per Tyler J.) that a new trial is barred by the "double jeopardy" clause of the Fifth Amendment, reasoning that a coerced plea entered during trial is the legal equivalent of an improper declaration of mistrial. Reduced to essentials, the holding is that even though the case had gone to final judgment, and even though defendant had the judgment set aside, double jeopardy barred retrial. This holding is contrary to a rule followed by this Court for almost seventy years: that double jeopardy does not bar retrial of a defendant who has procured the setting aside of a judgment of conviction.

A. THERE IS NO DOUBLE JEOPARDY WHEN A DEFENDANT IS RETRIED ON CHARGES EMBODIED IN A JUDGMENT WHICH IS SET ASIDE ON HIS MOTION

1. The principle that the Fifth Amendment does not preclude retrial following the reversal of a convic-

tion was first announced by this Court in 1896 in *United States* v. *Ball*, 163 U.S. 662, although the same rule may be found in the original congressional debate on the amendment[1] and in many federal decisions prior to *Ball*.[2] This rule was described as "elementary in our law" as recently as *Forman* v. *United States*, 361 U.S. 416, 425, and has been applied on numerous occasions in this Court.

In *Ball* itself an earlier conviction had been reversed on writ of error because of a defective indictment, and the case was remanded for "* * * such further proceedings in relation to the defendants as to justice may appertain" (*Ball* v. *United States*, 140 U.S. 118, 136). The defendants were reindicted and convicted, despite their plea of former jeopardy. In holding that the plea was properly overruled, this Court stated (163 U.S. at 671–672):

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. * * * it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment,

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[1] 1 Annals of Congress 753.

[2] The propriety of retrial was recognized by several of the lower federal courts and was earlier intimated by this Court in *Ex Parte Lange*, 18 Wall. 163, 173–174. As to the history of the rule allowing retrial following reversal on appeal, see generally *Green* v. *United States*, 355 U.S. 184, 189 (opinion of the Court) and 201–204 (dissenting opinion). See also Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 3–8.

or upon another indictment, for the same offence of which he had been convicted.

In subsequent cases, this Court has held that a defendant may be resentenced following the setting aside of an original illegal sentence (*Murphy* v. *Massachusetts*, 177 U.S. 155); that he may be retried after his first conviction is reversed on a confession of error (*Stroud* v. *United States*, 251 U.S. 15);[3] that he may be retried after his first conviction is reversed on the ground of insufficient evidence (*Bryan* v. *United States*, 338 U.S. 552); and that he may be retried after the original conviction is reversed for error in instructions to the jury (*Forman* v. *United States*, *supra*). In each of the cited cases, as in the case at bar, there was an original conviction or judgment which had been set aside in proceedings initiated by the defendant. Each defendant later contended that because of double jeopardy he could not be retried or resentenced. And in each instance this claim was rejected under the holding of *Ball* that a defendant who has his conviction set aside may be retried.[4]

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[3] The basis for the *Stroud* confession does not appear in the document filed by the Solicitor General with this Court. See No. 694, O. T. 1917 (papers). However, the government's brief in the cited case explained that error had been confessed "for the sole reason that the trial court had refused to receive, on behalf of the defendant, the testimony of convicted felons * * *." (Brief on behalf of the United States, p. 2, *Stroud*, *supra*, No. 276, O. T. 1919).

[4] The decision in *Green* v. *United States*, 355 U.S. 184, did not alter the long-standing rule that one who is successful on appeal may be retried for the *same* offense of which he had been convicted. In *Green* the defendant had been tried for first-degree murder, convicted of second-degree murder, and

It has never been questioned that this rule applies when the defendant's judgment is set aside on collateral attack as well as when it is reversed on appeal. See *Robinson* v. *United States*, 144 F. 2d 392 (C.A. 6), affirmed, 324 U.S. 282; *King* v. *United States*, 98 F. 2d 291 (C.A.D.C.); *Bryant* v. *United States*, 214 Fed. 51 (C.A. 8). Indeed, this conclusion seems indisputable. Both 28 U.S.C. 2255 and 28 U.S.C. 2106 (relating to the power of the appellate courts on direct appeal) include the power to grant new trials. There is obviously no reason why a defendant who proceeds under Section 2255 should receive any greater measure of relief than an accused who proceeds through normal appellate channels.

The rationale of the rule, as this Court has generally stated it, is that a defendant impliedly waives his right not to be retried for a particular offense whenever he seeks to have his conviction of that offense set aside. See, *e.g.*, *Trono* v. *United States*, 199 U.S. 521, 533; *Bryan* v. *United States*, 338 U.S. 552, 560. An alternative statement, early espoused by Justice Holmes but never adopted by a majority of the Court, is that the original jeopardy continues until the cause is finally determined—after all appeals, collateral attacks, and retrials are concluded—by a

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after a successful appeal was retried and convicted of first-degree murder. Noting that in appealing his conviction for second-degree murder, Green did not "waive" what was, in practical effect, his acquittal of first-degree murder, the Court held that retrial for the greater offense was barred by the double-jeopardy clause. The Court carefully pointed out that the decision did not involve the familiar right to retry an appellant for the same offense as was embodied in the judgment of conviction. 355 U.S. at 189–190.

definitive judgment of conviction or acquittal. See *Kepner* v. *United States,* 195 U.S. 100, 134–137 (dissenting opinion), and *Green* v. *United States, supra,* at 219 (dissenting opinion).[5] Neither formulation of the underlying principle can be squared with the result reached in the instant case, where the defendant, in a collateral attack upon the conviction, succeeded in seting aside his guilty plea.

Indeed, in *Bryan* v. *United States,* 338 U.S. 552, this Court held that a defendant could be retried after reversal of his conviction for failure of the trial court to direct a verdict of acquittal. Rejecting the defendant's contention that he should be set free because he should have been acquitted by directed verdict at trial, this Court held unanimously (338 U.S. at 560):

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of

[5] The theory of continuing jeopardy was approved by the American Law Institute in its 1935 recommendations as to the law of double jeopardy. Administration of the Criminal Law, A.L.I. (1935 draft of proposed statute on Double Jeopardy), Section 14. In the more recent Model Penal Code, the Institute did not spell out any particular theory of retrial, but simply provided that double jeopardy did not preclude retrial where a conviction had been reversed on appeal. Model Penal Code (proposed official draft, 1962), Section 1.08(3). Congress adopted a view of continuing jeopardy in enacting the double jeopardy provisions of the Uniform Code of Military Justice, 10 U.S.C. 844. For application of the principle, see *United States* v. *Zimmerman,* 2 U.S.C.M.A. 12.

> acquittal. " * * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."

If the *Ball* rule authorizes retrial when a defendant has erroneously been denied a directed verdict of acquittal, *a fortiori* it also authorizes retrial where (as here) the defendant has merely been denied the chance of obtaining an acquittal from the original jury.

B. THE FUNDAMENTAL PURPOSES OF THE *BALL* RULE APPLY WITH FULL FORCE TO JUDGMENTS ENTERED UPON GUILTY PLEAS

While the scope of the *Ball* rule has generally been defined by references to the concept of "waiver," that doctrine does not, without more, provide a full explanation of the underlying reasons for allowing retrial of a defendant whose conviction has been set aside. Before elaborating those reasons, we would stress that in this country there has never been any substantial doubt as to the soundness of the result or the importance of the purposes the rule serves. The only realistic alternative would be the British system, allowing review of a conviction but forbidding retrial after reversal.* As indicated by the discussion which

* Another alternative—requiring the defendant to remain under a judgment and sentence that may have resulted from error at trial in order to spare him a second trial—was once accepted by Mr. Justice Story sitting on circuit (*United States* v. *Gibert*, 25 Fed. Cas. 1287) but was otherwise rejected by the courts at an early date for reasons best summed up by Mr. Justice McLean's comment that it "guarantees to [the defendant] the right of being hung, to protect him from the danger of a second trial" (*United States* v. *Keen*, 26 Fed. Cas. 686, 690).

follows, we do not believe that this is a desirable approach or that the traditional rule of American jurisprudence should be altered.

1. An obvious and serious objection to forbidding retrial after a conviction is set aside is that it grants the guilty an immunity from punishment simply because of trial error. Important interests of society are at stake in a trial for crime. It reflects no lack of solicitude for the individual's interest in fair and expeditious procedures to say that an error in the course of the trial, *e.g.*, an overzealous comment by a prosecutor, an erroneous ruling on an item of evidence, or the incorrect phrasing of an instruction to the jury, ought not be the final determinant of the questions whether a crime has been committed and whether measures should be taken to deal with the offender.

The *Ball* rule allowing retrial after a conviction has been set aside fully reconciles the very significant right of society to insist that a guilty defendant not be set free because of an erroneous legal ruling and the defendant's right not to be convicted without a fair trial. Without the *Ball* rule, the defendant could only be assured a fair trial at the expense of the no less important need of society to punish the guilty after a fair trial. It is hardly necessary to add that the importance of the *Ball* rule as the sole means of reconciling these otherwise conflicting rights of the defendant and society is magnified as the courts exercise ever-increasing care in scrutinizing the fairness of the trial which has led to a conviction.

The Congress which first passed upon the "double jeopardy" clause plainly believed that the right of society to retry a defendant who has had his conviction set aside is the necessary corollary of the defendant's right to judicial review of his conviction. This is shown by the uniform assumption that a rule allowing retrial after conviction was a right and advantage to which the defendant was entitled because otherwise he would remain under judgment and sentence despite reversible errors at trial. Thus, in opposing an earlier draft of the clause which said that "[n]o person shall be subject * * * to more than one trial or one punishment for the same offence," Representative Benson objected that defendants were "entitled to more than one trial" and Representative Sedgwick "thought, instead of securing the liberty of the subject, [the proposed amendment] would be abridging the privileges of those who were prosecuted." 1 Annals of Congress 753. Representative Sherman spelled out the objection at greater length (*ibid.*):

> * * * He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He thought that the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of that advantage.

2. There is a second and equally serious objection to a rule forbiding retrial after a judgment against the defendant has been set aside. Inescapably, such a rule would force the reviewing court to consider the defendant's innocence or guilt in making its decision as to the fairness of the trial, for reversal in this context means granting an immunity to the defendant rather than ordering a new trial. The effects on standards of review in the British courts has been conservatively stated in this way:

> * * * Hence, if the court finds that an error was committed below, it has to choose between setting the accused free or affirming his conviction on the ground that error did not result in a substantial miscarriage of justice. It cannot follow a middle course of ordering another trial which would be free of the error which infected the first trial. The result is that some guilty persons are turned loose without punishment for no other reason than that errors were committed in their trials. Whether others are punished who might have been acquitted if their trials had been free of error is a question on which there can be no confident answer. * * *[7]

A rule permitting retrial on reversal of a defendant's conviction is the procedural cornerstone of a system of review designed to assure that the guilt or innocence of the defendant is treated as irrelevant to the propriety of sustaining the judgment against him. Only if the reviewing court is allowed to adopt the

[7] Karlen, *Appellate Courts in the United States and England* (1963), p. 110.

middle ground of ordering a new trial, can there be confidence that it will review the fairness of the trial without regard to the ultimate merits of the sentence imposed upon the defendant. It is the *Ball* rule which alone provides the assurance, lacking in the British system, that a conviction will not be sustained, although trial error may have substantially affected the jury's determination, because of the appellate court's unwillingness to grant immunity to a defendant it regards as plainly guilty.

As this Court has said, "it is not the appellate court's function to determine guilt or innocence";[8] a conviction is not to be sustained merely because "the appellate court is left without doubt that one who claims its corrective process is, after all, guilty,"[9] or because, on reviewing the record, the reviewing judges "reach the conclusion that the error was harmless because [they] think the defendant was guilty."[10] We submit that this standard of review—looking only to the possible effects of the error on the jury—is susceptible of achievement only if the defendant can be retried after his conviction has been set aside. The *Ball* rule is therefore essential to the effectiveness of our system of review in criminal cases. It represents a clear and firm decision that it is better to subject the defendant to the burden of retrial than to inject the issue of his guilt or innocence into a reviewing court's decision on the fairness of his con-

[8] *Kotteakos* v. *United States*, 328 U.S. 750, 763.
[9] *Bollenbach* v. *United States*, 326 U.S. 607, 615.
[10] *Weiler* v. *United States*, 323 U.S. 606, 611.

viction. This Court, we believe, has never departed from this preference for a review procedure affording maximum assurance that a conviction has resulted from a fair trial, albeit the cost of that procedure is the defendant's burden in undergoing retrial.

3. The considerations which support the *Ball* rule are fully applicable to the case at bar; they warrant retrial after a conviction based upon a guilty plea has been set aside. It is clear, we think, that the objection to granting a defendant immunity merely because of error at his trial applies equally when the judge's error has induced a guilty plea. In such a case, no less than in any other case of trial error, the ultimate purpose of a criminal trial—to determine by fair and proper proceedings the guilt or innocence of the accused—has been defeated by an error which calls for correction but not for the abandonment of the prosecution.

The second of the considerations noted above also applies, and with unusual force, in the case of a coerced guilty plea. Assessing the effects of the numerous events and pressures that lead either to a confession or a guilty plea in order to determine whether the defendant's will has been overborne is surely one of the most troublesome tasks that any reviewing court must undertake. The difficulty is not merely that the standards are inevitably less than precise and the facts delicate and complicated. There is the further difficulty that in this situation, more than in any other, the defendant's guilt is likely to be established, and this element may improperly intrude upon the review-

ing court's decision. Except for the rule of the *Ball* case allowing a retrial after reversal of a conviction, this last factor would seriously interfere with the check that a reviewing court furnishes against less-than-fully-voluntary pleas of guilty.

The record in the present case is illustrative of the importance of the *Ball* rule in this regard. Judge Weinfeld did not find this a case of clearly unjustified judicial error. He did not find that the trial judge's announcement of the sentence he intended to impose was designed as a threat to induce Tateo to plead guilty. Tateo's conviction upon his guilty plea was set aside on collateral attack only after a careful analysis and appraisal of a number of factors affecting Tateo's will, including particularly "the normal strain under which a defendant labors during a trial, greatly intensified by the cumulative impact of the testimony offered against petitioner by his co-defendant" (R. 55). Judge Weinfeld ordered a new trial because he feared that the context in which Tateo's plea was made foreclosed "that capacity for reasoned choice, that freedom of will which is essential to a voluntary plea of guilty" (R. 55). The *Ball* rule, permitting him to order a new trial, enabled him to proceed without any reference to the issue of Tateo's innocence or guilt. Indeed, Judge Tyler, who sustained the plea of double jeopardy in this case, noted that Judge Weinfeld's belief that he could order a new trial might have influenced his decision to overturn Tateo's conviction (R. 109–110).

C. THE APPLICABILITY OF THE *Ball* RULE TO JUDGMENTS ON GUILTY PLEAS ENTERED DURING TRIAL IS NOT AFFECTED BY THIS COURT'S DECISIONS IN CASES DEALING WITH MISTRIALS PRIOR TO JUDGMENT

The court below held that "[t]his case is crucially different from the usual instance in which a conviction is set aside under 28 U.S.C. 2255" because "Tateo's trial commenced but was not completed" (R. 131). Relying upon *Downum* v. *United States*, 372 U.S. 734, the court found the *Ball* rule inapplicable when the defendant has been prevented from obtaining the verdict of the first jury empanelled. As we have shown, neither the repeated statements of the *Ball* rule nor its purposes admit of an exception simply because the judgment under attack was entered on a guilty plea after the trial had begun. Moreover, the reconciliation of the cases dealing with mistrials and those dealing with reversals of final judgments is to be found elsewhere.

1. One of the two principal justifications of the *Ball* rule—to permit judicial consideration of alleged trial errors uninfluenced by the consideration that reversal might reward guilt—obviously has no application where a district court has ordered a mistrial for the convenience of the prosecution or the court. *Downum* is such a case—one of mistrial for the convenience of the prosecution. This crucially differentiates the policies applicable to a case such as *Downum* from those in this case and in *Ball* where a retrial is ordered only after reversal of a judgment of conviction.

Procedural considerations analogous to those which justify the *Ball* rule are, however, presented where

the trial judge must determine whether to order a mistrial in order to protect the defendant's right to a fair trial. Even in this context—which is far more difficult than the present case or *Ball* because the traditional doctrine of waiver cannot be applied—this Court has held, for reasons identical to those justifying *Ball*, that the defendant may be retried This is, indeed, the basis of the holding in *Gori* v. *United States*, 367 U.S. 364, 369–370:

> * * * Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

2. The court below erred in concluding that the distinction between the *Ball* holding allowing retrial and the *Downum* holding forbidding it lay in the fact that in a case like *Ball* the defendant has enjoyed the right to go to the jury. This distinction has no foundation. By hypothesis, where a jury verdict is reversed on appeal or collateral attack the defendant has *not* enjoyed a meaningful right to take his case to the jury originally assembled. He has been convicted after an unfair trial and the unfairness is often such as to make the jury verdict a nullity.

Thus, when convictions are set aside for errors in instructions and new trials ordered, as in *Andres* v. *United States,* 333 U.S. 740, 752, or *Grunewald* v. *United States,* 353 U.S. 391, 415, the underlying theory is that a verdict based on erroneous principles does not represent a jury determination of the issues. It is even clearer that there has been no meaningful jury verdict where courts have ordered new trials after reversing convictions because of instructions by the trial court which were regarded as tantamount to partial or complete directed verdicts of guilty. See, *e.g., Konda* v. *United States,* 166 Fed. 91 (C.A. 7); *Cummins* v. *United States,* 232 Fed. 844 (C.A. 8); *Dinger* v. *United States,* 28 F. 2d 548 (C.A. 8); *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875; *Schwachter* v. *United States,* 237 F. 2d 640 (C.A. 6); *Edwards* v. *United States,* 286 F. 2d 681 (C.A. 5). Again, there is no real sense in which there is a jury verdict in a case such as *Smith* v. *United States,* 161 U.S. 85, where a conviction was reversed because the judge had told the jury that testimony of witnesses called by the defendant to testify to the reputation of the deceased as a quarrelsome person should be disregarded if the witnesses were themselves convicts. The Court correctly regarded this as a "command to disregard" the defendant's evidence. Also, retrial has been ordered where the judge interferes with jury deliberations by coercive inquiries (*Jacobs* v. *United States,* 279 F. 2d 826 (C.A. 8)) and where comments and questions of the judge belittle the defendant and his case (*United States* v. *DeSisto,* 289 F. 2d 833 (C.A. 2)).

Obviously, in these cases the defendant was, in every meaningful sense, deprived of his right to take his case to the jury. Yet in each he could be retried. We submit that the reason for this cannot be, as the court below held, because there was a meaningless jury verdict. Retrial was allowed in each case because the conditions of the *Ball* rule were satisfied and its purposes served. The same holds true here.

II

EVEN IF THE *Ball* RULE WERE NOT APPLICABLE TO THIS CASE, RETRIAL WOULD BE AUTHORIZED UNDER THE RATIONALE OF THE MISTRIAL CASES

The issue of Tateo's guilt was not decided by the jury originally assembled to hear his case because the conduct of the trial judge—announcing to counsel his plans as to sentence—led Tateo to terminate his trial and to enter a guilty plea. We submit that if Tateo had responded to the trial court's announcement of the proposed sentence by terminating his trial without a guilty plea, *i.e.*, by seeking and obtaining a declaration of mistrial, he could be retried. Therefore, his retrial after Judge Weinfeld set aside his conviction and ordered the retrial he requested (R. 39) is authorized not only under the *Ball* rule, but also under the rationale of this Court's mistrial cases.

We accept Judge Weinfeld's conclusion that, under the stress of a trial going badly for the defendant, the trial judge's statement as to the sentence he would impose rendered Tateo's guilty plea subject to attack. Tateo's plea, we assume, was materially affected by a consideration that should not have entered into his de-

cision whether or not to plead guilty—his knowledge that a conviction on a jury verdict would probably result in a far stiffer sentence than would conviction on a guilty plea. But it is invariably an error or impropriety—of one kind or another—which induces a defendant's motion to terminate one trial and obtain a new trial before a different judge or jury. The factors emphasized by Judge Weinfeld in finding Tateo's guilty plea invalid are the common stuff of motions for a mistrial. Every defendant who asks for a mistrial because of an error of the prosecution or the trial court terminates his trial to avoid consequences to which he should not have been subjected: either having to submit his case to a jury influenced by the prejudicial effects of the trial error or having to try his case before a judge who is unfavorably disposed to him. Also, every decision by a defendant to seek a mistrial is apt to be significantly influenced by the normal stresses of trial and the coercive effects of a strong opposing case.

This analogy to an ordinary mistrial on the defendant's motion is controlling here. Tateo was no more without meaningful alternatives than is any defendant who must choose between accepting the risks of an unfavorably disposed judge or jury and asking for a mistrial. When the court made known its views as to the sentence to be imposed if the case proceeded to a verdict of guilty, Tateo could have chosen to disregard the judge's attitude and to allow the case to go to the jury in the hope of being acquitted; if convicted, he could have taken an appeal and challenged (at the very least) the sentence imposed, relying upon

the judge's earlier statements (see *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7)). Instead, he chose to terminate his trial. In choosing this alternative, Tateo had the assistance of counsel at all times; in fact, he acted on the strong recommendation of counsel and in light of the strength of the government's case. In deciding to terminate his trial, he exercised a choice of the very kind that the courts have invariably treated as meaningful for purposes of applying the doctrine of waiver in cases involving a defense motion for mistrial. There is no reason to treat this case differently because this defendant first pleaded guilty and then, in a collateral proceeding, sought to set aside the plea and obtain a retrial at that stage.

There are no factors of prosecutorial abuse in this case that might conceivably justify barring retrial of the case. As Judge Tyler recognized in upholding the defendant's claim, "the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution" (R. 133, fn. 4). Nor is immunity required to guard against the prospect that the government might obtain some unfair advantage by a retrial, *e.g.*, an opportunity to buttress a weak case. As Judge Weinfeld found, even the defense counsel was of the opinion "that the Government's case was strong; that there was an excellent chance of conviction" (R. 49). Accordingly, the traditional reason underlying the theory of jeopardy through mistrial—that the government should not seek or obtain a second chance when things did not go well the first time [11]—is totally lacking here.

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[11] *Green* v. *United States*, *supra*, at 187–188; *Gori* v. *United States*, *supra*, at 369; *Downum* v. *United States*, *supra*, at 736.

In sum, to bar retrial in the present case would be to grant immunity as a consequence of an action of the defendant which was no less voluntary than the ordinary defense motion for a mistrial and which was to his advantage in that it terminated a trial which his counsel regarded as extremely likely to result in conviction.[12] Thus, whether the Court treats this case as controlled by the rules generally applicable when a defendant has invoked a postconviction remedy, or deals with it by analogy to the mistrial cases because the defendant was induced to forego proceeding before the original jury, the result is the same: The defendant had every right to lay bare the error, as he belatedly elected, but he enjoys no immunity from the conduct of a new and fair trial.[13]

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[12] Except for *Downum* v. *United States*, 372 U.S. 734, where the facts showed that in substance the mistrial had been declared because the government was not fully prepared for trial, whenever the issue has been presented in the past, this Court has always upheld retrial following discharge of a jury. See: *Simmons* v. *United States*, 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States*, 144 U.S. 263 (typical of several "hung jury" cases); *Thompson* v. *United States*, 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico*, 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter*, 336 U.S. 684 (court-martial dismissed when military advance of unit made it impractical to obtain additional witnesses desired to be heard by court-martial); *Gori* v. *United States*, 367 U.S. 364 (mistrial granted on court's own motion for what court believed to be misconduct of the prosecutor).

[13] If Tateo is convicted after a fair trial, the sentencing judge would presumably take into account, in imposing a new sentence, the period of time Tateo has already served.

CONCLUSION

For the reasons stated, we respectfully submit that this Court should reverse the judgment below and reinstate the counts of the indictment to which the defendant pleaded guilty.

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